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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

FURNESS, WITHY & COMPANY, LIMITED, Petitioner, AGAINST YANG-TSZE INSURANCE ASSOCIATION, LIMITED, *et al.*, Respondents.	No. 106.

BRIEF FOR RESPONDENTS.

STATEMENT.

This cause comes before the Court on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, issued June 16, 1915, to review decisions adverse to the petitioner as owner of the steamship *Pomaron.*

The final decision of the Circuit Court of Appeals for the Second Circuit was entered June 23, 1914, in pursuance of its opinion dated June 10, 1914, pp. 168-176, and which affirmed the decision of the District Court, Learned Hand, D. J. Pp. 147-156. The former opinion is reported in 215 Fed. Rep. 859; the latter is not reported.

A petition for a writ of certiorari had been presented previously herein, on April 12, 1915, Docket Number 921, October Term, 1914, and had been denied by this Court on April 19, 1915.

The renewal of the application for the writ

was based on the grounds that the questions involved in this case were identical to those presented by the petition of Olaf Lie, Number 110, October Term, 1916, writ of certiorari issued May 12, 1915. The latter case involves the construction of the Collision Rules applicable to navigation in a fog, while the present case arose in clear weather and under Articles 19 and 21, International Rules, requiring the starboard hand vessel (*Pomaron*) in a crossing situation to keep her course and speed.

On October 5, 1914, a petition for limitation of its liability had been filed by this petitioner; and on April 22, 1915, after denial of the first petition for a writ of certiorari, an agreement of settlement and compromise among the parties to the issues herein was entered in the limitation proceedings. A motion to dismiss the present writ is now before this Court. A separate brief in support of the motion has been presented for the consideration of the Court.

The litigation grew out of the collision between the British steamship *Pomaron*, and the German steamship *Alleghany*, which occurred at sea on February 2, 1912, and which resulted in the sinking of the *Alleghany* and her total loss, with all her cargo.

The respondents were owners or insurers of cargo shipped on the *Alleghany*. The original libels proceeded against the owners of the two vessels jointly. The owner of the *Alleghany*, Hamburg Amerikanische Packetfahrt Actien-Gesellschaft, filed a peition for limitation of its liability and surrended the amount of its pending freight for the voyage. Pp. 51-52. The fifteen suits against the petitioner, as owner of the *Pomaron*, were consolidated and tried together.

The established facts rest almost wholly on the testimony of those on board the *Pomaron,* six witnesses from that vessel having been examined.

Short statements of the master and first officer of the *Alleghany* were admitted in evidence by stipulation, p. 142, as was a translation of the *Alleghany's* log book. Pp. 144-147.

The *Pomaron's* log book extracts appear on pp. 78, 90, 91 and 117.

The circumstances attending the collision are as follows:

The *Pomaron,* with a cargo, was bound across the Atlantic from Baltimore and the Chesapeake Capes to Leith. The *Alleghany* was bound from New York to the West Indies and South America.

The weather was fine and clear. Pp. 88-89.

There is not any dispute as to the courses and speeds.

Courses. The course of the *Alleghany* was South 2° West true. This course is confirmed by the *Alleghany's* position at departure off Barnegat to her position at collision, from her log book. Pp. 52, 144-145.

The course of the *Pomaron* was East by North by her compass, or East by North ¼ North magnetic, p. 84, which would be East 19° North true, applying the chart variation of 5° Westerly. The two courses protracted would intersect at an angle of 111 degrees, the *Pomaron* being to the southward and westward of the *Alleghany* and on the latter's starboard hand as they approached each other. These respective courses had been maintained for several hours prior to the collision. P. 84.

Speeds. The speed of the *Pomaron* was nine knots. Pp. 115, 139. The speed of the *Alleghany* was somewhat greater, being about 11½ knots. According to the *Alleghany's* log book, the entry for the run during the morning watch of four hours preceding the collision was 46 miles. P. 144. The average hourly speed from the data given in the *Alleghany's* log book for her departure off Barnegat the preceding night, to her position at collision, would give a fraction greater than 11½, or about 11.8 knots. The officer on watch on the *Pomaron* assumed that the *Alleghany* was making about 13 knots an hour. Pp. 104, 111, 139.

The *Alleghany* was first sighted by the *Pomaron* on the port hand of the latter when about ten or twelve miles off, and three-quarters of an hour before the collision. Pp. 84, 90, 92, 139. The *Pomaron* was not sighted by the watch officer on the *Alleghany* nor by the wheelman, probably until shortly before the collision. P. 142.

Both steamers maintained their courses and speeds until approximately a mile apart, when the *Poramon* altered course under a port helm and sounded one blast on her whistle. Pp. 85, 92, 124, 126. The time of this change of course is given as 11:14 a. m., in the *Pomaron's* log book. The bearing of the *Alleghany* is also entered as about North East. *Exhibit 7*; pp. 90, 91, 139.

If the *Alleghany* bore North East, since the *Pomaron* was on the compass course East by North, the *Alleghany* was then three (3) points or 33¾ degrees on the *Pomaron's* port bow. As the *Alleghany* was making a speed at least two and a half knots greater than that of the *Pomaron*, it follows that the *Alleghany* would have

crossed the bows of the *Pomaron* before the latter could have reached the line of the *Alleghany's* course. In other words, the vessels would have passed each other safely, if neither had made any change in course or speed. *Post,* p. 35.

According to the log book entry, the *Pomaron* ran three (3) minutes, under the port helm, when, at 11:17, the *Alleghany* having sounded two blasts, the *Pomaron's* helm was put hard-aport and the engines were stopped and reversed. P. 86.

The officer in charge of the *Pomaron's* navigation, Westgarth, testified that the *Pomaron* went off her course "about a point; went off to about East" under the first porting, p. 85; and that she swung about three points under both helm movements, p. 97; so that the *Pomaron* was heading East South East at the moment of collision. Pp. 100-101; *Yang-Tsze Exhibit B.* These helm movements turned the course of the *Pomaron* towards the direction in which the *Alleghany* was proceeding, viz., to the Southward, although, when the second helm movement was made, it was known that the *Alleghany* intended to continue passing ahead of the *Pomaron,* as was indicated by the former's two-blast signal.

The testimony of the wheelman, Hyslop, shows that the *Pomaron* must have been swinging continuously to the southward from the time the first order to port the helm was given up to the time of the collision. He testified as follows at page 124:

"Q. What was the order you got? A. He blew one blast and gave me an order to port a little.

"Q. What were his words to you? A. Port a little.

"Q. Did you? A. Yes, I gave her a stroke or two and she went over about a point.

"Q. Did you steady the helm or keep it over? A. *I had it to port all the time.*

"Q. You say she went over a point; if you had your helm to port all the time, why didn't she go over more? A. I mean before he gave me the order to hard-a-port.

"Q. You said the order given to you by the mate was port a little and that you ported a point? A. Yes.

"Q. Did you steady your helm after that? A. *No, I had it to port all the time,* and she went over a point before he gave me the order hard-a-port.

"Q. She had made a point when he gave the order hard-a-port? A. Yes."

The time of the collision as recorded in the *Pomaron's* log book was 11:21 a. m. *Exhibit 7,* pp. 90, 92. As the time of initiating the movement was stated at 11:14 a. m., the *Pomaron's* helm movement must have been continuously operative during *seven minutes* preceding the collision.

An effort was made later to repudiate the log entry, and to reduce the time that elapsed from the first porting to the second porting, thereby decreasing the interval during which the port helm must have been effective. P. 106. However, the log entry was a statement of a fact based on the officer's judgment formed at the time, and is more reliable than his testimony given after doubts as to the accuracy of the entries were suggested by the captain, who did not have any personal knowledge of the times. Pp. 96, 97, 106.

The officer who made the log entry, and who was solely in charge of the *Pomaron's* navigation at the time, and responsible for her movements, explicitly admitted on cross-examination that he departed from the rule requiring him to hold his course. He testified at page 109:

"Q. You stated you departed from the rule which required you to keep your course? A. Yes.

"Q. Having the other vessel on your port bow? A. Yes."

The *Pomaron's* change of course is the essential feature of the case, and will be discussed more fully in the following text.

During the time the *Pomaron* was swinging to the Southward under her port helm, the *Alleghany* was proceeding on her original course and making for the locality towards which the *Pomaron* was being directed. According to the statement made by First Officer Kurt Morens, of the *Alleghany,* who was on watch, "no commands were given the steersman of the *Alleghany.*" P. 142. Chief Officer Westgarth, of the *Pomaron,* maintains that the *Alleghany's* helm was put hard astarboard, p. 87, and the log of the *Alleghany* has an entry to this effect, apparently; but it seems probable that such a change of course, if made, was without effect on the collision, one way or the other.

If the *Alleghany* was heading South East by South at the moment of collision, as shown on Westgarth's diagram, Exhibit B, pp. 100-101, her change of course was about three points or 33¾ degrees. The angle between the two vessels at collision, as stated by Westgarth, was about 45 degrees. P. 87. Assuming that the *Pomaron's* heading is correctly shown, viz., East South East, the *Alleghany's* heading, to make a 45° angle between the two headings, must have been South South East; that is, the *Alleghany* would have changed course only two points instead of three. The petitioner's answer, pp. 11 and 12, alleges that the *Alleghany* "kept on at "full speed across the *Pomaron's* bows, *at the*

"last moment swinging apparently under a star-"board helm." p. 12, and the District Judge concluded that "the *Alleghany's* stern was still on "her original course when the collision oc-"curred." P. 153.

It seems clearly established that, whatever may have been the faults of the *Alleghany* by way of omissions under the rules, there was not any positive act in her movements that directly caused the collision; and, on the other hand, that the *Pomaron* was the active agency in placing herself in a position that resulted in a collision.

The *Alleghany* sank, with all her cargo, at about 3:20 p. m. on the day of the collision, in deep water, within a few miles of the place of collision. Pp. 71-72, 91-92, 146.

There is not any dispute as to the fault of the *Alleghany*. Her defective lookout was the cause of her failure to take seasonable precautions to avoid the collision by keeping clear of the *Pomaron*, thus constituting a failure to comply with Article 19 of the International Rules, viz.:

"When two steam-vessels are crossing, so as to involve risk of collision, the vessel [*Alleghany*] which has the other on her own starboard side shall keep out of the way of the other."

The question now raised concerns the *Pomaron's* navigation, and the effect of her admitted departure from the opposing navigatory rule, Article 21 of the International Rules, viz.:

"Where, by any of these rules, one of the two vessels is to keep out of the way, the other [*Pomaron*] shall keep her course and speed." [Italics mine.]

Apart from the failure of the two vessels to observe the ordinary rules governing the mere fact

of a collision of the character occurring, it did not seem possible, even under the most favorable circumstances, that the vessels could have been seen within a minute or two of the time when they would have come in contact. Under the most favorable conditions for navigation, there is a strong presumption of fault against both vessels. The *Pomeroy* was a well-appointed steamer, and her officers were competent men. The circumstances of the collision occurring under such conditions was communicated by the [illegible] Captain, which made in its opinion [illegible].

"The loss of property in this case [illegible] sought was [illegible] broad daylight, and with no other vessels [illegible] with navigation. The two vessels [illegible] steamers [illegible] therefore, and [illegible] more easily than any other kind of vessels. They were in plain sight of each other [illegible] apart. They nevertheless came into collision and with such force that one of them sank in a few hours carrying down with her the entire cargo. It is difficult to see how such a happening [illegible] vessels were [illegible] to exercise reasonable care. Plain common sense constrains one to such a conclusion. [illegible] under such conditions can [illegible] the closest scrutiny of the navigation of both vessels it can be discovered that [illegible] from all culpable blame."

The District Judge made a most careful and painstaking analysis of the evidence and of the probabilities; and, after applying the test of mathematics to the situation from every possible angle, the Judge arrived at the conclusion that the change of course of the *Pomeroy* was premature, and that it could not be shown that the *Pomeroy*'s fault in this respect did not contribute to the collision. P. 154.

Similarly, the Circuit Court of Appeals, after an equally careful consideration of the facts and the law, arrived at the conclusion that the *Pomaron* had not sustained the burden of proof resting on her to show that the infraction of the rule was not a contributing cause of the collision. P. 171. Although the Court did not discuss possible distinctions of the "did not" and "could not" rules growing out of the interpretation of the doctrine of *The Pennsylvania,* 19 Wall. 125, and now raised by the petitioner, it seems clear that the Court's decision was based on the "did not" rule, as appears from the statement in its opinion:

"Concluding, then, as we have, that the *Pomaron* was in fault, it remains to inquire whether the fault contributed to the collision. For, if the fault had nothing to do with the collision, it may be disregarded." P. 171.

In its petition for writ of certiorari, the petitioner states, at page 2:

"The principal question is whether under this Court's decision in *The Pennsylvania,* 19 Wall. 125, a privileged vessel, which before a collision with a burdened vessel ported her helm in violation (*prima facie,* at least) of Article 21 of the International Regulations may be held responsible for the collision, notwithstanding that it appears as matter of law that the porting was no part of the cause of the collision, and notwithstanding also that the manifest and primary cause of the collision was the gross and unparalleled negligence of the burdened vessel in failing to keep any lookout whatever in the direction of the privileged vessel and not seeing her until collision was unavoidable."

Unless the rule of *The Pennsylvania* is to be divested of all meaning and force, it is difficult

to comprehend how it can appear that an infraction of a statutory rule of navigation is "no part of the cause of the collision" as a matter of law, when it cannot be shown that the infraction of the rule was not a contributing cause in fact.

We contend that the inquiry here is a comparatively simple one; viz., has the *Pomaron*, which admittedly departed from a statutory rule of navigation, shown that the departure from the rule did not contribute to the collision? If not, the *Pomaron* must bear the consequences.

FIRST POINT.

THE CHANGE OF COURSE OF THE "POMARON" WAS A BREACH OF THE STATUTORY OBLIGATION TO KEEP HER COURSE AND SPEED AS THE STARBOARD HAND VESSEL IN A CROSSING SITUATION UNDER ARTICLE 21, INTERNATIONAL RULES.

It is admitted that the *Pomaron* was the starboard hand vessel with respect to the *Alleghany*, whose course was crossing that of the *Pomaron*, and that, in this situation, the *Pomaron* sounded a one-blast signal and ported her helm, directing her course to starboard, when the two vessels were separated by a distance which the witnesses estimated at about a mile. *Griffiths*, pp. 76-77; *Westgarth*, pp. 85-86, 95-96, 98, 112, 139; *Hyslop*, pp. 124, 126-127; *Hogg*, p. 129.

The testimony of Westgarth, the officer who was conducting the *Pomaron's* navigation at this time, is as follows:

When the *Alleghany* got about a mile away "I thought he was getting pretty close and it was time for him to do something." * * * "So

I thought I would give him a blast on the whistle to attract his attention; wake him up a bit, *and I also ordered the helmsman to port a little.*" The helmsman obeyed the order, "she went off the course about a point; went off to about east." "Q. Why did you port? A. I had to give him a little more clearance." P. 85.

"About a minute or so after I gave him the blast, he answered and gave me two blasts." "I rang the engine full speed astern as soon as he gave me two blasts and reversed the engine." P. 86. "From the time I blew my first whistle until I gave the order to reverse, it would be somewhere about a minute." "From the time I reversed my engine until the two vessels came together was about four minutes." P. 87.

A scrap log was kept in the wheelhouse of the *Pomaron*. He made an entry in it about one o'clock following the collision, and wrote the remainder of the entry about seven o'clock that night. P. 89. The entry thus written stated as follows:

"10.35 A. M.: Sighted steamer on port bow steering to southward, bearing about northeast.

"11.14 A. M.: Steamer getting close and keeping his course and speed, so in order to try and avoid collision I gave one blast of whistle and altered my course to starboard, other steamer answered by two blasts on whistle.

"11.17 A. M.: Stop and full speed astern.

"11.21 A. M.: Collided with steamer *Alleghany* port bow striking him abaft bridge deck on starboard side." P. 92.

The witness claimed, on direct examination, that he did not take the time of these things, as he had no watch or clock by him. P. 86.

After the log was put in evidence the witness

challenged the accuracy of the entries. P. 93. On cross-examination, he admitted that he had intended to make correct entries, and they were correct as he remembered them. P. 94. His first doubts as to the correctness of the time were suggested by the captain a day or two after the steamer arrived back in Newport News. Pp. 96, 97. The collision occurred on February 2. The conversation referred to probably occurred on Febuary 4th or 5th.

Notwithstanding the doubt later alleged to have been created by the captain, the witness on March 12, 1912, made a deposition before the officers of the Board of Trade, in regard to the accident, at Leith, Scotland, in which he again reiterated the statement as to the time of sounding the one blast signal [and making the alteration of course], viz., "at 11.14 A. M." Pp. 139-140.

It appears that the witness compared times with the engineer, who told him the engines were going astern four minutes. *Post*, p. 15. The time of the collision was also confirmed by the fact that it immediately followed the ringing of the ship's bell which called the watch to dinner at 11.20. Pp. 97-98.

Obviously the reason the captain wanted to alter the account given in the log was that as the *Pomaron's* speed was 9 knots, or about 900 feet a minute, he would have difficulty in explaining a change of course three minutes before the situation became such as to require the stopping and backing of the engines. It would have meant that the first porting occurred nearly a half mile back of the point where the risk of collision became such that the *Pomaron* was obliged to take measures to avoid collision.

Westgarth further testified:

"My best judgment is that the ships were a half mile apart when I began to back." P. 100. The witness apparently concedes that, if he had stopped instead of porting, at the time when he first ported, the collision would have been avoided, but adds: "but then it was not my place to"; p. 101. But, if it was not his place to stop at that time, obviously it was not his place to port.

"The steamer was half a mile off when she gave me two blasts." P. 102. "When the *Alleghany* blew two blasts, she was probably about four points, three or four points on our bow. She was a faster vessel than we were." "She was only three points to begin with." P. 103.

Hyslop, the wheelman, testified that he first saw the *Alleghany* between four and five points on the port bow, p. 101, ten or twelve miles away. Pp. 123-124. "She would probably be about a mile away when I got the first order from the Chief Officer." "His order was port a little. I gave her a spoke or two and she went over about a point." "I had it to port all the time." "After I had gone over a point, he gave me the order 'hard-a-port' and gave the engines full speed astern." "That was when the *Alleghany* blew two blasts, less than a minute after our one blast." P. 124. The *Pomaron* was nearing about E S E at collision. P. 125. The bearing was just estimated. He did not take it on the compass. Pp. 125-126. He did not observe the ship's heading at the time he got the order hard-aport. P. 127. "The ship was a mile away as near as I can tell when I got the order to port." Pp. 126-127. It would be as much as that. "It was as much as a half mile when I got the order hard-a-port." The ship swings very slowly with the helm ported four spokes. P. 127.

Hogg, boatswain, also "saw the *Alleghany* three or four points on port bow when I came on deck after breakfast; nine or ten miles away." "She was about a mile away when the Chief Officer blew one blast on the whistle." P. 129. "The *Alleghany* blew two about a minute after we blew." Pp. 129-130. The *Alleghany* was a half to three-fourths of a mile away when she blew two whistles. P. 131.

The testimony of Johnson, the chief engineer of the *Pomaron,* is positive to the effect that he looked at the engine-room clock when the signals to stop and go full speed astern were received, and also when the shock of collision was felt; and that the elapsed time was four minutes, viz., from 11.20 to 11.24 a. m. Pp. 116-117.

The District Judge was of the opinion that the interval of seven minutes from the first change of course, until the collision, was too great, and he adduced from circumstantial evidence and the probabilities a conclusion that the total interval was less than three minutes, although he stated "It may be thought that this does violence to the "testimony." P. 152.

Despite his conclusions in this respect, and his obvious inclination to consider the situation in the most favorable light for the *Pomaron,* he decided that the initial change of course was made prematurely and unjustifiably. The Judge stated in his opinion, p. 156:

"The time had not yet come when he needed to act alone, and his action was not *in extremis;* it was to assist the other vessel to accomplish her duty."

The admitted distance apart of the two vessels when the *Pomaron* ported, viz., about a mile p. 95, considered with the bearing of the *Alleghany*

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and the angle of intersection of their protracted courses, indicates that the *Pomaron* must have been nearly two-thirds of a mile from the protracted course of the *Alleghany,* which was the danger line.

There can be no doubt but that the *Alleghany* had ample time and sea room to avoid the *Pomaron* when the latter first ported her helm. Indeed, the chief officer admitted this on re-direct examination. In reply to the question:

"What did you think about the possibility of collision when you blew one blast?", he stated:

"My thoughts at the time were that if he had blown one blast and altered his course to starboard, if he had ported his helm, he could have gone under my stern." Pp. 107-108.

Also, on cross examination, in answer to the question:

"Q. In order to get the matter quite plain on the record will you tell us when it was that in your judgment the circumstances had developed so that collision became unavoidable unless you did something? A. Really not until the *Alleghany* had given me two blasts on the whistle.

"Q. Up to that time you had appreciated risk of collision from the time you blew your first whistle? A. Yes. [When a mile away, pp. 95, 139.]

"Q. But you thought it might have been avoided by the other vessel until she gave you two blasts? A. Yes.

"Q. Then she was half a mile away from you? A. Yes.

"Q. Bearing about three points as I understand you on your port bow? A. Yes.

"Q. Then it became under the rule your duty to do something? A. Yes.

"Q. It had not been your duty to do anything before that? A. No, sir." P. 109.

On redirect, the witness said further:

"Q. Of course you recognized, you know that under the International Rules, having the *Alleghany* on your port hand, it was your duty to maintain your course and speed? A. Yes.

Q. You did maintain your speed, did you? A. Yes, right up to the time I received the two.

Q. Until you thought collision was inevitable? A. Yes.

Q. But you changed your course? A. Yes.

Q. Why? A. Just to give the *Alleghany* a little more clearance." P. 108.

In other words, the officer in charge of the *Pomaron* gratuitously took it upon himself to perform the part of the manœuvre that pertained to the *Alleghany* solely, and thereby did what was said in *The Delaware,* 161 U. S., 459, at p. 469, "would bring about more collisions than it would prevent." There was certainly no immediate danger at that time, and moreover, the *Alleghany* had given no distinct notice that she would not comply with her obligations. The change of course made by the *Pomaron* was clearly premature.

It does not follow, however, that the situation was not then one to which the Rules had already become applicable, as is now contended by counsel for the petitioner. The officer responsible for the *Alleghany's* navigation appreciated that there was "risk of collision," although there was not "immediate danger," when he sounded the one-blast signal and ported, as appears from the testimony quoted above. P. 109. He also recognized the fact that it was not his duty under the rule to stop at that time, thus conceding that the rule was then in force and that he was navigating in respect of the rule as to this requirement at least. P. 101.

A number of authorities are cited in the petitioner's brief purporting to support the contention that the rules had not become applicable to the *Pomaron*, and that, by altering her course, she did not violate a statutory rule, therefore. It will be seen from an examination of these cases that the special circumstances of each case rendered it unnecessary to apply the rules of navigation sooner.

In *The Banshee*, 57 L. T. 841, 6 Asp. M. C. N. S. 221, which is extensively quoted in the petitioner's brief, that vessel was nearly a half-mile astern of the *Kildare* and gradually overtaking the latter when the rules were applied. It is manifest that the overtaking situation cannot be likened to a crossing case; in the former, the vessels necessarily have more time and space within which to manœuvre with respect to each other before risk is involved, while in the latter, as here, the vessels are approaching the danger lines of each other's courses rapidly.

Lord Esher remarked in *The Banshee*, p. 222:

"They [the rules] only apply at a time when, *if either of them does anything contrary to the Regulations*, it will cause danger of collision."

In other words, the rules must be applicable at that time, else the action taken could not be said to be a contrary one.

Under this *dictum*, the *Pomaron* clearly placed herself within the rule the moment the helm was ported, even if the rule did not apply earlier.

The Peter Benoit, 13 Asp. M. C. N. S. 203, the only case cited by the petitioner where the starboard-hand rule was applied, was a situation in which one vessel was entering a river and the other was passing out, when a change of course of one brought about a crossing situation. The

rule was held to be applicable at that moment. The *Pomaron,* on the other hand, had been on a crossing course long before she changed course, when about a mile distant from the *Alleghany,* and much less distant from the latter's course.

The ruling in *The Nichols,* 7 Wall., 656, from which the petitioner quotes, is contrary to its contention.

Mr. Justice Clifford in handing down the opinion of this Court, there held that the rules of navigation applied to two vessels when they were as much as two or three miles distant from each other. In that case the court was deciding the question of liability for a collision between a bark and a schooner. The vessels had sighted each other when two or three miles apart and at that time they were approaching each other nearly end on and if they had not changed their courses they would have soon been meeting nearly end on thus involving the risk of collision.

Immediately after the vessels sighted each other the mate of the schooner altered her course. This altering of course together with subsequent manœuvres on the part of the bark resulted in a collision.

The District Court in deciding the case held that the distance between the vessels of two or three miles was such that the schooner was not in fault in altering her course.

On appeal the Circuit Court was of a different opinion and held that as the vessels were nearly dead ahead when sighted and their combined speed 12 miles an hour they thus became within 10 or 15 minutes of meeting. They were dangerously close together so that the change of course on the part of the schooner involved not only the risk of collision but was the controlling cause of it.

Mr. Justice Clifford at page 665 said.

"Argument for the appellant is that the distance between two vessels was so great when the helm of the schooner was put to starboard that it cannot be considered as a fault and such it seems was the opinion of the District Judge; but the proposition in view of the circumstances cannot be sustained as it was in the night time and the combined speed of the two vessels was at least 12 miles an hour, and none of the witnesses pretend that more than 10 or 15 minutes elapsed after the second order of the master of the schooner was given to put the helm hard up, before the collision took place."

In the case of *The Scotia,* 14 Wall, 170, the steamship *Scotia* and the sailing vessel *Berkshire* had been in a collision as the result of which the sailing vessel was sunk. The statement of facts in that case, at page 174, contains the following reference to the distance between the vessels from the time that they were first sighted up to the time of the collision.

"The *Scotia* was first seen from the *Berkshire* bearing one point or so off the ship's port bow at a distance apparently of five or six miles, then the steamer's white mast head light only was seen.

"Immediately on her sighting the steamer which was at most from 15 to 20 minutes before the collision, her mate gave an order to luff and she did luff so as to head more into the wind. The effect of this was to make her go further to the south and thus diverge further away from the course of the steamer. She continued in this new direction 10 or 15 minutes, when, moving at the rate at which it was proved that the vessels were moving, she must have been more than 1 or 2 miles from the *Scotia.* Her helm was then suddenly put to starboard, then steadied for a brief period, then put hard astarboard and kept there, thus pointing her directly across the bow of the approaching vessel."

In delivering the opnion of this court, Mr. Justice Strong said at page 180;

"It is plain that had the ship continued on her course after she first saw the steamer's bright light, there could have been no collision and still more, had she not afterwards and when near the steamer put her helm to starboard, she would have been out of all danger."

The reference in Mr. Justice Strong's opinion to the wrongful manœuvre of the schooner in putting her helm to starboard refers to the time when, according to the statement of facts, the vessels were from 1 to 2 miles apart. The court held the schooner solely at fault. In the present case, the vessels were estimated to be a mile apart when the *Pomaron* ported.

In the case of *New York & Liverpool Steamship Company* v. *Rumball,* 21 How., 372, in which a steamer was condemned for not taking timely precautions to avoid collision with a sailing vessel whose lights had been in sight about fifteen minutes. Mr. Justice Clifford in handing down the opinion of this Court, said, at page 384:

"The rules of navigation such as had been mentioned are obligatory upon vessels approaching each other from the time the necessity for precaution begins and continue to be applicable as the vessels advance so long as the means and opportunity to avoid the danger remain. * * *"

This statement of the rule was cited with approval by Mr. Justice Brown in the case of *The Breakwater,* 155 U. S., 252, at page 264.

There was a question as to whether or not the navigation rules should apply to a ferryboat at the moment she started to leave her berth in the slip, and this Court held that the rules became operative as her bow reached the outer side of the pier.

After quoting from Mr. Justice Clifford's opinion, Mr. Justice Brown said:

"Where rules of this description are adopted for the guidance of seamen who are unlearned in the law and unaccustomed to nice distinctions, exceptions should be admitted with great caution and only when imperatively required by the special circumstances mentioned in Rule 24, which may exist in any particular case, rendering the departure from them necessary in order to avoid immediate danger."

The question as to when the rules take effect is clearly answered by the court in the case of *The Transfer No. 10,* 137 Fed., 666.

Judge Holt, in deciding that case, said at page 666:

"And the question in this case as in all collision cases is not what the colliding vessels do when they get down close to each other, but what was the manœuvre which was adopted and what was the manœuvre which it was their duty to adopt under the rules of the law *when they were still far enough apart to adopt those manœuvres deliberately and safely.*" (Italics ours.)

In the case of *The Philadelphia,* 199 Fed., 299, a tug and tow had collided with a schooner. The master of the tug had seen the schooner beating down the river three miles away. The tug continued to proceed up the river without any change of course or speed. The schooner continued on her course until on her last tack before the collision and then when about 150 feet from the tug her wheel was put hard-a-starboard in an attempt to avoid the collision.

The Court said at page 302:

"[1] The expression 'risk of collision' has a different meaning from the expresion 'immediate danger' as used in the twenty-seventh article.

'Risk of collision' means 'chance', 'peril', 'hazard', or 'danger of collision' merely, and not immediate danger. *The D. S. Gregory* and *The George Washington,* Fed. Cas. No. 4, 1000. 'Risk of collision, means, not merely certainty of collision, if no efforts be made to avert it, but danger of collision; and there is danger or risk of collision whenever it is not clearly safe to go on. *The Aurania* and the *Republic* (D. C.) 29 Fed. 98, 123.

In the case of *The Seaton,* 9 P. D., it was found that the vessel *Polcevera* and the *Seaton* prior to the collision had been running on parallel courses, the *Polcevera* being the hindmost and faster vessel. Subsequently when the *Polcevera* was 3 or 4 miles distant from the *Seaton,* the course of the former was altered so as to intercept the course of the *Seaton* and as a result of this change of course the collision occurred. The court held that the *Polcevera* was at fault for this alteration of her course and the resulting collision.

In the case of the *Jesmond* and the *Earl of Elgin,* L. R. 4 P. C. 1, the court held that two steamers were within such proximity "as to involve risk of collision" where they were meeting on nearly opposite courses at a joint speed of 18 or 19 knots and distant a mile and a half from each other.

The same ruling was made in the case of *The Bougainville* and *James C. Stevenson,* L. R. 5 P. C. 316, where a steamship and a sailing vessel were distant two or three miles from each other and approaching at a joint speed of 17 knots.

In the present case, although the vessels were estimated to be about a mile apart when the *Pomaron* departed from the rule by changing her course, the distance to the point of danger, viz: the intersection of the respective courses protracted, was considerably less, and the vessels were approaching this point at a combined speed

of more than 20 knots. The change of course by the *Pomaron* at this time altered the relative bearings of the two vessels, and necessarily operated to change the result. It was a vital movement, therefore. The result shows that it was one that did not lessen the risk of collision, and, on the contrary, that it increased the danger. It was a manœuvre directed particularly with respect to the *Alleghany,* and on the assumption that the rules were then applicable to the latter vessel. It was plainly an act within the meaning and operation of the rules, and its effect should be considered accordingly.

It is suggested by the petitioner that the *Pomaron's* departure from the rules should be disregarded on the ground that it did not prejudice the *Alleghany's* navigation, since the latter's navigators were not aware of the *Pomaron's* presence at this time. It may be purely speculative to predict what the *Alleghany* might have done if the *Pomaron* had not changed course, but the established facts clearly indicate that the *Alleghany's* omission to do anything would *not* have resulted in collision. If the *Pomaron's* movement did not in fact decrease the danger, it cannot be said that the *Alleghany* was not prejudiced, despite the latter's ignorance of the change of course. A wrongful manœuvre is certainly not justifiable simply because it is not known to others affected by it. The proposition of the petitioner seems equivalent to freely licensing infractions of law, so long as the party who may be injured thereby is kept in ignorance of the unlawful act.

The courts have shown repeatedly their aversion to admitting exceptions to the rule that the starboard hand vessel in a crossing situation must hold her course and speed. *The Corsica,* 9 Wall., 630; *The Elizabeth Jones,* 112 U. S., 514; *The*

Britannia, 153 U. S., 130; *The Breakwater,* 155 U. S., 252; *The Delaware,* 161 U. S., 459; *The Chicago-The City of Augusta,* 125 Fed., 712, *reversing* 102 Fed., 991; *The Eagle Wing,* 135 Fed., 826; *The John Fleming,* 136 Fed., 917; *The Cygnus, The H. F. Dimock,* 142 Fed., 85; *Lake Erie Transportation Company* v. *Gilchrist Transportation Company,* 142 Fed., 89; *The Umbria,* 153 Fed., 851; *The John H. Starin,* 162 Fed., 146; *The Deveaux Powell,* 165 Fed., 634; *reversing* 120 Fed., 522; *United States* v. *Erie Railroad Company,* 172 Fed., 51; *The James A. Walsh,* 194 Fed., 549; *The Haida-The Natalie,* 191 Fed., 623; 196 Fed., 1005; *The Elizabeth,* 197 Fed., 160; *The Putney Bridge,* 219 Fed., 1014.

The case of *The Britannia,* 153 U. S., 130, was decided under the earlier rule, which required the starboard hand vessel to maintain her *course* only. 153 U. S., p. 138. The additional requirement as to maintaining the *speed* was added to the later rule. 153 U. S., p. 442. Nevertheless, the Court held the starboard hand vessel, *Beaconsfield,* at fault for stopping and becoming motionless, thereby failing to fulfill her obligation to keep her course.

The Court, by Mr. Justice Shiras, stated at pages 141-142:

"It is argued that the words 'shall keep her course' do not mean that she shall maintain her speed, and English cases are cited to the effect that the rule does not imply that the vessel shall *maintain the same speed.* If this is all that is meant in the cases cited, and we so read them, we have no reason to disagree with them, and they do not, in the slightest degree, impugn our reasoning. But if the contention is, and if those cases must be understood as holding that a vessel, whose duty it is to keep her course, complies with that duty by reversing her engines and ceasing

to move at all, we are unable to concur in such a view. It is inconsistent with both the words and the sense of the rule. A vessel which voluntarily becomes motionless cannot properly be said to keep her course. The word 'course,' both from its etymology and the primary meaning given to it by lexicographers, signifies a running or moving forward—a continuous progression or advance.

"The collocation of the rule, and its direct reference to rules 17, 19, 20 and 22 [governing the crossing situation], plainly point to the meaning that, while the other vessel must keep out of the way, the preferred vessel shall not interfere with or thwart the movements of such other vessel by bringing a new element into the calculation, which would be done if, instead of pursuing her course, she stopped her headway. It is not meant that some exigency or obvious danger might not justify her in checking her speed, and even in stopping altogether. But such a case is provided for in the twenty-fourth rule. As we have seen, no such exigency is found to have existed in the present case."

In *The Delaware*, 161 U. S., 461, this Court declined to hold the *Talisman*, the starboard hand vessel, at fault, although she continued to hold her course and speed up to the moment of collision. P. 466.

Mr. Justice Brown, in delivering the opinion of this Court, stated:

"When the *Delaware* was about a length off, the *Talisman* sounded an alarm signal of three blasts, *but did not change her helm or reduce her speed before the collision*" [italics ours]. P. 466.

* * *

"The main fault charged upon the *Talisman*, however, is that of not stopping and reversing, when the failure of the *Delaware* to take measures to avoid her became apparent." P. 467.

* * *

"The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th Rule of the original International Code, (Rev. Stat. § 4233), and of the 16th Rule of the Revised Code of 1885, and doubtless applies so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way." P. 468.

* * *

"The cases of *The Britannia,* 153 U. S., 130, and *The Northfield,* 154 U. S., 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. *Belden* v. *Chase,* 150 U. S., 674; *The Highgate,* 62 L. T. R., 841; S. C. 6 Asp. Mar. Law Cases, 512." P. 469.

In *The Elizabeth,* 197 Fed., 160, the Circuit Court of Appeals for the Second Circuit condemned the starboard hand vessel for altering her course where the situation was considered by

her navigators as one of emergency, overruling the District Court, which had excused the change of course as justifiable under the circumstances. The Circuit Court of Appeals stated at p. 162:

"We have little doubt that, had the *Elizabeth* when she sighted the *Scotia* navigated as the priviliged vessel to cross the bow of the *Scotia*, this collision would not have happened; the question is, was she in fault for not doing so? The starboard hand rule operates on both vessels, the one is to get out of the way by change of course or stopping or reversing. The other is to keep her course and speed."

It follows from the authorities cited that the obligation of the *Pomaron* to maintain her course and speed was as binding under the rules as that of the *Alleghany* to keep clear. The *Pomaron* did not have the right to change her course until the *Alleghany* could not by any possibility fulfill her duty to keep clear. Her premature change of course was a distinct violation of the statute.

If such infractions of the rules are to be condoned, the rules become ineffectual, and the certainty of conduct, which results from strict observance of the rule, would give place to wavering and hesitation on the part of those for whose guidance the statutes were enacted.

Mr. Chief Justice Fuller, in delivering the opinion of this Court in *Belden* v. *Chase*, 150 U. S., 674, pp. 698-699, forcefully expressed the necessity of requiring strict adherence to the rules of navigation as follows:

"Obviously they must be rigorously enforced in order to attain the object for which they were framed, which could not be secured if the masters of vessels were permitted to indulge their discretion in respect of obeying or departing from them."

* * *

"Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. *The Oregon,* 18 How., 570."

It is contended on behalf of the petitioner that the *Pomaron* should not be condemned for her failure to comply with the rule, because the *Alleghany* was grossly at fault in respect of her lookout, in accordance with the rule stated by Mr. Justice Brown in *The Umbria,* 166 U. S., 404, p. 409, and applied in *The Victory and The Plymothian,* 168 U. S., 410, p. 423. It is to be remarked, however, that in these cases the vessel which invoked the rule did not commit any specific statutory fault.

The case of *The Oregon,* 158 U. S., 186, cited in support of the major and minor fault doctrine, did not involve a violation of a statutory obligation on the part of the vessel exonerated. The *Clan Mackenzie* in that case was charged with fault for failure to show a torch to the *Oregon,* the former being at anchor. The Court found that the *Clan Mackenzie* was displaying proper anchor lights in accordance with the statutory requirements, p. 198, and that the statute requiring the display of a torch light was not applicable to foreign vessels, the *Clan Mackenzie* being British. Pp. 189 and 199.

Similarly the case of *The Lord O'Neill,* 66 Fed., 77, involved an omission on the part of the tug *Peerless,* to sound a passing signal required by the regulations of the supervising inspectors of

the Steamboat Inspection Service. P. 78. The statutory rules of navigation were not considered in connection with the *Peerless*. The Court found that the failure to sound the signal "could not have prevented the change of course or checked the speed of the steamship, which was the primary and immediate cause of the collision and therefore did not contribute to it." P. 80.

The major and minor fault doctrine apparently is without force where a violation of a statutory fault in any degree occasions or materially relates to the collision. It should not be applied simply because the fault of one vessel is the primal or more pronounced cause of collision. *The Albert Dumois,* 177 U. S., 240. *The Manitoba,* 122 U. S., 97, p. 109. *The Sunnyside,* 91 U. S., 208.

In the present case, both vessels committed statutory faults, the *Alleghany* in failing to keep out of the way as required by Article 19, and the *Pomaron* in failing to keep her course as required by Article 21. If the case were between the two ships, the rule of the *Umbria* might as well have been invoked by the *Alleghany* as by the *Pomaron*. Each vessel violated a statutory obligation, and each is answerable to innocent third parties for the damage that resulted, unless it is in a position to show that its fault, arising from the violation of its statutory duty, was not a cause of collision. *The Pennsylvania,* 19 Wall., 125.

The *Pomaron's* navigation under the circumstances here, both by reason of her departure from the rule, and because of the presumption arising from the occurrence of a collision under the conditions that prevailed, should be subjected to the strictest scrutiny.

SECOND POINT.

THE FAULTS OF THE "POMARON" CONTRIBUTED TO THE COLLISION.

It is asserted in the brief of the petitioner that the *Pomaron's* first porting did not contribute to the collision, but there is not any attempt made to demonstrate the truth of the statement, or to state the facts on which the assertion is based. The discussion is concerned mainly with a more or less academic distinction between the so-called "could not" and "did not" rules of burden of proof.

The violation of a statutory rule binding on the *Pomaron* having been clearly established, it seems that the important inquiry is whether or not this fault contributed to the collision in fact.

Our contention is that the initial porting was an important factor of the resulting collision, and clearly contributory thereto; moreover, that this act was induced by the negligence of the officer in charge in failing to take proper compass bearings as required by the rules; and, furthermore, that the hard-porting, coupled with reversal of the engines, was also a contributing fault, and not excusable under the circumstances.

There is not any dispute concerning the *courses* and *speeds* of the two steamers as they aproached each other.

The angle at which the original courses intersected is established as 111°, and this angle remained the same up to the time that the *Pomaron* first ported.

The speeds were in the ratio of 11½ knots to 9 knots, the latter being that of the *Pomaron.*

The only other factor at all open to discussion is the bearing of the *Alleghany* from the *Pomaron* prior to and at the time of the latter's vital change of course. That there is any element of uncertainty on this point is due to the dereliction of the

officer charged with the duty of "carefully watching the compass bearing"; and, also to his obvious inclination to repudiate his contemporaneous record of the bearing of the *Alleghany*.

The bearing was entered in the log book shortly after the event as about North East. Pp. 90-93. There seems to have been only this one compass bearing taken, and it should be accepted as fixing the relative positions of the two vessels. A North East bearing would place the *Alleghany* three (3) points on the *Pomaron's* port bow.

The testimony of Westgarth, the officer in charge of the *Pomaron's* navigation, is as follows:

"Q. At 10.35 according to your memorandum you sighted a steamer on the port bow steering to southward?

A. Yes.

Q. Bearing about North East?

A. Yes.

Q. Did you take that bearing by the compass?

A. It was not a proper compass bearing; I just glanced over the top of the compass and took a rough bearing.

Q. It was not a guess; you looked at the compass?

A. It was not a true bearing, not an accurate bearing." P. 94.

Q. You looked over the compass at the vessel?

A. Yes.

Q. This was as near as you could come to it without taking a more careful bearing?

A. Yes.

Q. You were at that time steering by compass east by north?

A. Yes.

Q. The vessel was three points on your port bow approximately?

A. Yes; it would be more than that.

Q. It would be three points if that is correct?

A. Yes, if that is correct, if the bearing is correct.

Q. You intended it to be correct when you put it in the log?

A. It was partly what I remembered afterwards that I put in the log book because I don't take any note of the bearing at the time.

Q. You put it in a good deal nearer the time of the occurrence than today?

A. Yes.

Q. That was your best recollection at the time?

A. Yes.

Q. When did you put this down in the log book?

A. About 1 o'clock.

Q. The matter was all quite fresh in your mind at that time?

A. Yes." Pp. 93-94.

* * *

"Q. Did she continue to bear northeast from you?

A. Practically; she did not alter the bearing at all." P. 95.

That the bearing of the *Alleghany* from the *Pomaron* was not more than three points and probably less is established by other testimony.

The chief officer of the *Pomaron* testified that when the *Alleghany* answered the *Pomaron's* whistle with a signal of two whistles, the vessels being then half a mile apart, the *Alleghany* bore about four points, between three and four points, on the *Pomaron's* port bow.

"Q. At the time the vessel was half a mile away when she gave the two blasts what was her bearing from you?

A. How many points on the bow?

Q. Yes.

A. Probably about four points, three or four points on the bow." P. 103.

It is admitted that by her first porting the *Pomaron* had changed one point to starboard by the time the *Alleghany* answered with two whistles

and such porting must have increased the original bearing by one point; so that, if the bearing was four points *after* the change of course, it was three points *before* the change was made.

Another circumstance bearing upon the disputed question as to the *Alleghany's* bearing from the *Pomaron* is that the *Alleghany's* wheelsman failed to notice the approach of the *Pomaron* because his view to starboard was cut off by a wind-shield on the starboard side of the bridge. In order that this wind-shield should prevent his noticing the *Pomaron* it is necessary that she should have been well on the *Alleghany's* starboard bow, and the wider the bearing of the *Alleghany* from the *Pomaron*, the less the bearing of the *Pomaron* on the *Alleghany's* starboard bow must have been.

If the *Alleghany* bore as much as four points on the port bow of the *Pomaron*, the bearing of the *Pomaron* on the starboard bow of the *Alleghany* could not have been more than 24° or slightly more than 2 points, and the wheelsman should and would have seen the *Alleghany* notwithstanding the presence of the wind-shield on the starboard side of the bridge.

The angle at which the original courses of the vessels intersected is known to have been 111°.

If the *Alleghany* bore North East from the *Pomaron*, which is 3 points on the latter's port bow, the relative positions of the vessels with reference to the point of intersection of their courses may be represented by a triangle having angles of 111°, 33°45′ and 35°15′. By applying the rule that the sides of a triangle are proportionate to the sines of the opposite angles, it can readily be ascertained that the side of such triangle representing the distance of the *Pomaron* from the point of intersection of the courses would be 3760 feet, and the side representing the distance of the *Alleghany* from such point of in-

tersection would be 3618 feet, the side opposite the obtuse angle, 111°, being the distance of the *Alleghany* from the *Pomaron,* viz., one mile, or 6,080 feet.

The result may be reached practically by a graphic presentation as shown on the diagram appended.

It is evident that under these conditions no collision would have occurred had both vessels kept on without change of course or speed, for the *Alleghany* would have crossed the bow of the *Pomaron* with a good margin of safety. The *Alleghany* being 310 feet long and only 3618 feet from the point of intersection of the courses, and travelling at a speed of 11½ knots or 1165 feet per minute, her stern would have passed the point of intersection of the courses in 3.371 minutes. The *Pomaron,* 3760 feet from the point of intersection and proceeding at 9 knots, or 912 feet per minute, would travel in the same time 3076 feet; that is to say, the *Pomaron's* bow would have been 696 feet away from the point of intersection of the courses when the *Alleghany's* stern had passed it. *Diagram appended.*

The change of the *Pomaron's* course to starboard under a port helm would therefore carry her from a position of safety into one of danger, and must have contributed to the collision.

It is demonstrable also that had the *Pomaron* held her course, as Rule 21 provides, until the *Alleghany* had answered her signal, and had she *then* put her helm hard-aport and reversed her engines, as she did, collision would not have occurred.

If the bearing of the *Alleghany* on the *Pomaron's* bow was about four points when the *Alleghany* answered with two blasts, the vessels then being half a mile apart, the *Pomaron* must

have been 1,780 feet distant from the line of the course of the *Alleghany.** When at that distance it is admitted that she had completed a change of at least one point from her original course, and that difference of one point in her heading necessarily resulted in a difference of one-fifth of the distance she had to run, in the point at which she would cross the course of the *Alleghany;* that is, in travelling 1,780 feet she crossed the original course of the *Alleghany* more than 350 feet to the southward of the point at which she would have crossed had her course not been changed one point to starboard.

The fact that by the combined effect of her subsequent hard-aporting and reversed engines she swung further to starboard in no degree counteracted or offset the effect of her initial porting. It carried her still further to starboard, but the point at which collision occurred was necessarily 350 feet to the southward of the point at which she would have crossed the *Pomaron's* course, had her change of one point by her initial porting not been made. Since she

* NOTE: This result may be obtained by applying the proposition that the sides of a triangle are proportional to the sines of the opposite angles.

That the *Pomaron* must have been as much as 1780 feet from the course of the *Alleghany* when the latter's signal of two whistles was blown is shown by other testimony.

The Chief Engineer of the *Pomaron* testified, and the entries in his log corroborate his recollection, that about four minutes elapsed between the order full speed astern and collision, and that it took half a minute to reverse his engines. He also testified that the *Pomaron* would come to a standstill four minutes after her engines were reversed.

When the time within which a vessel may be brought to rest is known, the distance she will run can be determined by the formula: D=7/10 S T, in which D represents the distance in feet, S the speed in knots, and T the time in seconds. *Knight's Modern Seamanship*, p. 216.

The *Pomaron* requiring 4 minutes, or 240 seconds, to stop, and her full speed being 9 knots, the distance she would run before stopping would be 1,520 feet, according to this formula.

During the half minute occupied in reversing her engines, she would run at full speed 456 feet, making the total distance she would run, after the order to reverse was given, 1,968 feet. The *Pomaron* had, however, some headway at the time of collision.

struck the *Alleghany* only 100 feet from the latter's stern, it is apparent that had she been 350 feet further to the northward collision would not have occurred.

Her initial porting of one point did therefore contribute to the collision as a proximate cause thereof. See foot note, p. 42.

The chief officer of the *Pomaron* attempted to correct the bearing to which he had committed himself at the time of the occurrence, as that bearing obviously established not only that the situation did not require any action on his part, but that the porting brought the *Pomaron* directly into collision.

His further testimony on the bearing, which follows, also shows a remarkable lack of appreciation of the importance of the premonitory article in the International Rules:

"Preliminary—Risk of Collision."

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

He testified:

"Q. Did you watch the bearing of the other vessel?

A. Yes, just roughly.

Q. During this three-quarters of an hour?

A. Yes." P. 95.

* * *

"Q. You saw her first about three points on your port bow bearing about northeast?

A. Yes, perhaps she was more than that; if I had taken a correct bearing——

Q. It might have been less if you had taken a correct bearing?

A. Yes." P. 104.

* * *

"Q. You think the North East bearing mentioned in the log is not correct?

A. No, it can't be correct.

Q. How many points do you think you should have her on your port hand?

A. It should have been 5 at least, I should say." P. 113.

* * *

"Q. What is your recollection as to what her bearing was when you first saw her?

A. She would be five points, four or five points on the bow.

Q. When she was 10 or 12 miles away?

A. Yes." P. 113.

"Q. I asked whether you did not make the entry in the log book of the bearing as you actually thought it was at the time and you told me you did after looking over the compass?

A. I did not take a bearing; I did not notice the bearing; I just walked to the compass and looked over the top of the compass, because the compass is amidships, and by taking, as I very often do, a rough bearing of anything by the stanchion, you can tell whether she is within a point or a couple of points or where she is." P. 113.

* * *

"Q. Looking over the top of the compass you judged the vessel bore from you North East?

A. Not at the time I didn't.

Q. You put it in the log that way?

A. Yes, I put it in the log that way afterwards.

Q. You put it in the log at one o'clock?

A. Yes.

Q. Wasn't that your best judgment at the time of the bearing of the ship when you saw her?

A. I don't think it was.

Q. Do you mean to say that you would have put something in the log which at the time was not

your judgment as to the truth of the item you were putting in?

A. As far as I could judge as to the point, but I never worked it out to see how many points she was.

Q. The only reason you doubt it is now you see if she had been bearing the way you put it in the log and both vessels had steered in the direction you say that they were steering, and with the speed which you thought each of them had, there would not have been any collision unless you had ported? Isn't that so?

A. It was inevitable that there would be a collision the way she was coming; I couldn't go by the bearing at all; if I had taken a proper compass bearing, but I didn't." P. 114.

Why the chief officer of the *Pomaron* found it necessary to discredit the entry in his log of the bearing of the *Alleghany* is apparent, but it is evident that the bearing of the *Alleghany* from the *Pomaron* when first sighted could not have been *five* points *or even four points* as her chief officer stated.

If when ten miles distant she had borne even 4 points on the *Pomaron's* bow, the *Alleghany* would have been 7.57 miles and the *Pomaron* 4.36 miles from the point of intersection of the courses, and in that case the *Pomaron* would have reached the point of intersection of the courses when the *Alleghany* was more than 2¾ miles distant therefrom as will be found by applying the trigonometrical proposition or the graphic presentation referred to previously.

The faults of the *Pomaron* do not require mathematical demonstration, however. Her mate violated the rules without assuring himself of the necessity of doing so, and before there was

any such danger as to require action on his part. *Ante,* pp. 15-16.

It seems inconceivable that an officer in charge of a steamer, under the conditions that confronted the *Pomaron* should content himself with one hasty sight over the compass to ascertain whether or not the bearing of the *Alleghany* was changing. His testimony concerning the northeast bearing has been quoted above. He admits that he watched the bearing of the other vessel "just roughly," p. 94, that he "didn't bother to take any bearings at all"; p. 103, and that the *Alleghany's* bearing might have been more, or it might have been less than three points, if he "had taken a correct bearing." P. 104.

The question arises why he did not take several correct bearings during the *forty six minutes* interval from first sighting the *Alleghany,* at 10.35 A. M., to the collision at 11.21 A. M., or during the *thirty-nine minutes* from first sighting her to the change of course at 11.14 A. M. There can be no answer except an admission of a fault on the part of the officer on watch, and one that it is reasonable to infer was a contributing cause of the collision. It was incumbent on him to be sure that his change of course was justifiable. The importance of an accurate observation is emphasized by the "Preliminary" article of the International Rules. *Ante,* p. 37. If the change of course was made under an erroneous assumption as to the bearing of the *Alleghany,* which is the most favorable inference to be placed on the responsible officer's testimony, this does not excuse the fault. *The Glenogle,* 122 Fed., 503; *The Diana,* 181 Fed., 263.

The means adopted by the *Pomaron's* navigators to avoid collision, after it was definitely known by the *Alleghany's* two-blast signal that the latter would continue across the *Pomaron's*

bow, were ones the least likely to avoid the collision; but the situation could have been saved even then, if the *Pomaron* had not placed herself in a position of danger by her initial porting; that is, if she had not already headed a point towards the direction of the *Alleghany's* course, the effect of which had to be overcome.

In an elaborate discussion of manœuvres to avoid collision, with accompanying plates, in *Knight's Modern Seamanship,* Chapter XV, plates 98 and 99, pp. 250-259, the author demonstrates that the safer manœuvre under the circumstances that pertained then to this situation would have been to starboard the *Pomaron's* helm; also that if the port helm was used, the engines should have been kept at full speed ahead, to clear the danger arc as quickly as possible.

The District Judge, in commenting on the second port helm movement, stated:

"It seems to me reasonably clear that, had Westgarth starboarded, he would have cleared the *Alleghany.*" P. 155.

The manœuvre the *Pomaron* adopted of reversing when she hard-aported was, as is stated in Knight on Modern Seamanship, page 296, "the surest possible way of bringing about collision."

Starboarding at that moment would undoubtedly have prevented collision, or upon hard-aporting she should have kept her speed. She had 1700 feet to run before reaching the *Alleghany's* course, and by keeping her speed and hard-aporting she could have changed her course *eight points,* or 90° in advancing four lengths (1112 feet) along a line parallel with her original course. Knight's Modern Seamanship, p. 213.

It is claimed in petitioner's brief that the action at this moment was *in extremis.* It can hardly be said that a situation *in extremis*

exists when vessels are *half a mile apart* in broad daylight.

Another feature of the second helm movement, viz., the hard-aporting, is that it was probably a continuation of the first porting and induced by the latter, since it would have been more difficult to turn the *Pomaron's* head to port if the helm was already partly to port. The first fault directly affected the second movement, therefore; and the repeated error is fairly attributable to the initial violation of the rule.

If the *Pomaron* had kept her course until her Navigating Officer believed or realized that action on *his* part was necessary to avoid collision, which is the test laid down in all of the decided cases so far as the privileged vessel is concerned, collision would have been avoided had he then starboarded, or had he hard-aported and kept his speed, or had he reversed the engine only, *or had he done exactly what he actually did do* when any necessity of action on his part had arisen.

It is submitted that the proofs affirmatively establish that the *Pomaron's* faults did contribute to the collision.

NOTE: The natural sine of an angle of one point, viz., 11° 15′ of arc, is known to be .19509, *Bowditch Tables*, p. 383, the sine being the ratio of the perpendicular opposite the angle, to the hypothenuse, of the plane right triangle.

The perpendicular in linear measure varies with the distance from the angle measured, always at the ratio of the sine, which is to say that the perpendicular distance, or approximately the chord substending the angle, is about one-fifth the hypothenuse. Applying this fact to the practical problem of the effect of one-point change of course, it follows that the alteration in the vessel's position to one side, or the traverse, is equal to one-fifth of the distance made ahead, or the advance; that is, in a distance of one mile, the change of course of one point would bring the vessel to a position about a fifth of a mile above or below where the line of the original course would have placed her.

In the instance of the *Pomaron*, assuming she ran 2,700 feet ahead under her one-point change of course, to the southward, she would theoretically bring up at a point 540 feet south of where she would have arrived if the change had not been made, and, in a distance travelled of 3,760 feet, she would arrive at a point 752 feet further to the southward than if the course had not been altered.

THIRD POINT.

THE LOWER COURTS PROPERLY DECIDED THAT THE POMARON HAD NOT SUSTAINED THE BURDEN OF PROOF TO SHOW THAT HER FAULT DID NOT CONTRIBUTE TO THE COLLISION.

The gist of the petitioner's contention is that it has been charged with the burden of proving that the premature porting by the *Pomaron* could not possibly have contributed to the collision, and that all that should have been required was proof that such fault actually did not contribute thereto.

While in the opinions of both the District Court and the Circuit Court of Appeals it is stated that they were unable to find on the proofs that the initial porting by the *Pomaron* could not possibly have contributed to the collision, by neither court was the "could not" as distinguished from the "did not" rule actually applied. The distinction between the two rules appears to be that the "could not" rule obviates "the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence." *The Fanny M. Carvill,* (1888) 13 A. C. 455, 459; while under the "did not" rule the presumption that the violation of a statute did contribute to a disaster may be rebutted by evidence establishing that it actually did not contribute thereto. It is a peculiarity of the present case, that whatever conflict there is in the evidence appears in that of the *Pomaron's* own witnesses and especially in the testimony of the officer in charge of her navigation.

The District Judge not only gave this testimony most careful consideration but made elaborate calculations in the hope, as he frankly admits, of finding some adequate ground for ex-

onerating the *Pomaron,* and he states as his final conclusion "that absolutely no certainty whatever is possible." P. 155.

His opinion leaves no doubt that his final conclusion was that the evidence failed to establish that the initial porting by the *Pomaron did not* contribute to the collision.

The petitioner also argues that the Circuit Court of Appeals has decided that the fact that it was impossible upon the evidence to determine that collision would have occurred had neither vessel changed her course or speed made it impossible to determine whether the *Pomaron's* initial porting did or did not contribute to the collision, and this, it is said, is not a proper test.

The Circuit Court of Appeals, however, clearly indicated its attitude in respect of the proofs required, as appears from the following statement in its opinion:

"Concluding then, as we have, that the *Pomaron* was in fault, it remains to inquire *whether the fault contributed to the collision.* For if the fault had nothing to do with the collision it may be disregarded. The law unquestionably is that in cases of collision liability for damages rests upon the ship or ships whose fault occasioned the injury. And in considering whether the fault of the *Pomaron* contributed to the collision it is necessary to keep in mind the rule laid down by the Supreme Court in *The Pennsylvania,* 19 Wallace 125, 136 (1893) where the Court said:

" 'But when, as in this case, a ship at the time of the collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it

probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.' " Pp. 171-172.

The Court then proceeded to analyze the testimony in detail, and finally concluded that the evidence was not such as to justify the Court in exonerating the *Pomaron*, stating at page 173, "We have examined the evidence in the case with care and we have not been satisfied that either one of these vessels was free from fault." P. 173.

Both Courts, therefore, decided on the evidence adduced that the proofs were not sufficient to show that the *Pomaron's* faults *did not* contribute to the collision.

The rule of law applicable to the *Pomaron* as laid down in *The Pennsylvania*, 19 Wall., 125, is well settled. *Richelieu Navigation Company* v. *Boston Insurance Company*, 136 U. S., 408, pp. 422, 423; *Belden* v. *Chase*, 150 U. S., 674, 699; *The Martello* v. *Willey*, 153 U. S., 64, 76; *The Kate Butteroni*, 59 Fed., 494; *The Edward Smith*, 135 Fed., 32, p. 35; *Mooney* v. *Carter*, 152 Fed., 147; *Eastern Dredging Company*, 159 Fed., 540; *The Admiral Schley*, 142 Fed., 64, p. 67 (application for certiorari refused, 201 U. S., 648); *Hawgood Transit Co.* v. *Mesaba S. S. Co.*, 166 Fed., 697; *The Ellis*, 152 Fed., 980; Spencer on Collisions, p. 333, and authorities cited, viz.: *The Genesee Chief*, 12 How., 443; *Gaslee* v. *Shute*, 18 How., 463; *The Emily* Olc., 132; 1 Blatch., 236; *Cohen* v. *The Mary T. Wilder*, Taney, 567.

It is the petitioner's contention, apparently, that the lower Courts here erred in interpreting the meaning of the rule as applied in *The Pennsylvania*, 19 Wall, 125.

In that case the collision had occurred in a dense fog, between a sailing bark and a large

steamer, about 201 miles from Sandy Hook, in the track of inward- and outward-bound vessels. The bark was under way, and was moving at about the rate of one mile an hour. She was ringing a bell as a fog signal. The steamer was moving at the rate of seven knots an hour. The court divided the damages, holding the steamer at fault for immoderate speed in a dense fog, and the bark in contributory fault for her violation of the Act of Congress which requires sailing vessels under way to use a fog horn.

At page 135, Mr. Justice Strong, in delivering the opinion of this Court, said:

"It is next to be considered whether any fault of the bark *contributed* to the collision. That she was in fault is beyond controversy. She was in plain violation of the rules of navigation which required her to blow a fog horn * * * It must be conceded that *if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration.* The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." * * *

"*Then how can it be shown on the part of the bark that the failure to use the fog horn certainly contributed in no degree to the collision?* * * * The truth is the case is one in which, while the presumption is that the failure to blow a fog horn was a contributory cause of the collision, and

while the burden of showing that it was in no degree occasioned by that failure rests upon the bark, it is impossible to rebut the presumption. * * * Hence it appears to us the bark has not proved that her failure to obey the shipping regulations was not a concurrent cause of the injury she received."

The application of the rule in that case was more rigorous, if anything, than in the present case. This Court plainly stated in *The Pennsylvania,* "it is impossible to rebut the presumption" that the failure to comply with the statute did not to some extent occasion the collision. The harshest light in which the conclusions of the lower courts in this case may be regarded is that they decided the proofs were left in a situation of uncertainty; they did not go so far as to find that the presumption was one impossible to rebut in any event.

The later decisions of this Court reaffirmed the rule of law as stated in *The Pennsylvania.*

In the case of *Richelieu Navigation Co.* v. *Boston Insurance Co.,* 136 U. S. 408, the *Spartan* had stranded while running at full speed in a dense fog in violation of the statute requiring all vessels to go at a moderate speed in a fog. It appeared that the compass of the ship was defective. The action was brought on a policy of insurance and was tried at common law. The thirteenth charge to the jury was as follows:

"13. The law of Canada provides that all vessels shall run in a fog at a moderate rate of speed; and I do not undertake to direct you one way or the other in regard to this fact—that is, the rate of speed—but merely to say in general terms that if you find that the loss was occasioned by the excessive speed of the vessel, or by her want of

a lookout, or by the defects of the compass, the defendant is not liable." P. 414.

Mr. Chief Justice Fuller, in handing down the opinion of this Court, in which he approved the above charge, said, at page 422:

"In *The Pennsylvania,* 19 Wall., 125, it was held that where a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. *And this was but the statement of the settled rule in collision cases.* In this case, in view of the seventh section of the Canadian statute, and the fact that perils occasioned by the want of ordinary care and skill or of seaworthiness were excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to cause, the stranding."

Belden v. *Chase,* 150 U. S., 674, was an action at law brought by the owner of the steamboat *Charlotte Vanderbilt* in the Supreme Court of the State of New York against the owner of the yacht *Yosemite* for so negligently navigating the yacht as to run down the steamboat in the Hudson River. Upon writ of error from a judgment for the plaintiff in the Court of Appeals the judgment of the Court of Appeals was reversed and the cause remanded. It appeared from the evidence that the *Vanderbilt* had violated a rule requiring the blowing of whistles by passing steamers.

The Court held *inter alia* that there was error in leaving it to the jury whether upon the whole there was negligence in what was done or left undone by the *Vanderbilt,* and that the jury should have been charged as requested by the defendant below that

"8. As the proof is undisputed that the steamboat *Vanderbilt* and the yacht *Yosemite* were approaching each other head and head or nearly so, the law prescribes their duties respectively in regard to blowing their whistles."

Mr. Chief Justice Fuller said, at page 699:

"While * * * in construing and obeying the rules, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger, *the burden of proof lies on the party alleging that he was justified in such departure.* * * *"

The rule of the *Pennsylvania* was then restated:

"And it is the settled rule in this Court that when a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

The lower Courts in the present case found affirmatively that the *Pomaron* was not justified in departing from the rule at the time the departure occurred.

In the case of *The Martello,* 153 U. S., 64, this Court held that the absence of the statutory fog horn, and the use, in its place, of a mouth-horn, placed the burden of proof on the *Willey* to show her freedom from fault; and the Court concluded:

"* * * we think the bark has failed to sustain the burden of proving that the want of a mechanical fog horn could not have contributed to the collision," although the steamer heard the fog horn before collision.

That the burden rested upon the *Pomaron* of proving at least that her statutory fault *did not*

contribute to the collision, is conceded by its counsel, who cite *Prince* v. *Eastern S. S. Co.*, 109 Maine, 395, as laying down the proper rule. In that case, the Court states at p. 402, the conclusions to be gathered from the decided cases to be:

"1. That the presumption is that a violation of the navigation rules contributed to the disaster.

"2. That the presumption is the strongest—made so as a matter of policy—but yet rebuttable.

"3. That the burden is on the owner in fault to rebut the presumption.

"4. That the presumption may be rebutted by showing in any way that the fault actually did not contribute.

"5. That the presumption is not rebutted so long as the proof is doubtful. It must exclude every other hypothesis. And this, we are of the opinion, is what is meant by the 'could not' rule."

The Maine case grew out of a collision between the motor boat *Carolyn* and the steamer *City of Rockland*, which occurred in the Kennebec River, at 7:15 p. m. The action was at law to recover damages sustained by the *Carolyn* and her owner. The *Carolyn* did not carry a stern white light, or range light, required by the rules. The jury returned a verdict for the defendant, and the case was reviewed by the Supreme Judicial Court of Maine on exceptions to rulings, and to the charge to the jury, upon the question of contributory negligence and the burden of proof resting on the plaintiff.

After a discussion of the authorities from which the Court drew conclusions as quoted above, the Court stated, at pp. 402-403:

"Therefore, in the case at bar the 'could not' rule, as above defined would seem applicable. The case is in the same class as those from which citations have been made. This being so, we are unable to see why the case should not fall precisely in the line of *The Pennsylvania* and other cases cited, where it was held that *it was impossible to determine whether as a matter of fact the fault contributed to the disaster or not, and therefore that the presumption against the vessel was not rebutted.* (Italics ours.) The plaintiff did not show range lights, as the rules require. The fact being admitted, upon the decisions cited the plaintiff cannot recover in any event, because it is impossible for him to show that the omission did not contribute, therefore the exceptions should not be sustained, and the case sent back for a useless trial."

The petitioner states in the brief, "Our con-"clusions with respect to the true doctrine of "*The Pennsylvania* are supported by the Su-"preme Judicial Court of Maine in *Prince* v. *Eastern S. S. Co.*, 109 Me. 395" (the above case).

If the petitioner concedes that this is the proper interpretation of the rule, it seems that he cannot complain that the lower Courts in this instance ruled harshly against the *Pomaron* on the burden of proof. Both Courts were obviously convinced that the proofs failed to show that the *Pomaron's* violation of the rule *did not* contribute to the collision. Moreover, it was affirmatively found by both Courts that the departure was not justifiable in fact. Under these circumstances, however leniently the rule may be applied, the *Pomaron* cannot escape the consequences, since the burden under either interpretation of the rule, whether "could not" or "did not," has not been sustained.

A number of cases are cited by the petitioner relating to the contribution of faults in collision cases. It appears from an examination of these cases that the several deciding authorities were satisfied on the evidence adduced that the vessel charged with contributory fault had sustained the burden of the rule, by removing all possible doubts as to her negligence.

In *Long Island R. R. Co.* v. *Killien,* 67 Fed., 365, the statute in question was an enactment of the New York legislature, and not a Congressional rule of navigation, as here. The extract quoted on page 21 of petitioner's brief refers to this particular statute, and is not to be taken as general in scope. The Court ruled that the fault in question did not contribute to the collision. P. 367.

The same Court, in *The Pocohuntas,* 217 Fed., 135, found that the alleged violation of statute had not been satisfactorily established, and that it *did not* contribute to the collision.

The Court's finding in *The Huntsman,* 11 Asp. M. C., N. S. 606, was to the effect that the action, taken by the starboard hand vessels mitigated the damage, which would have been more serious otherwise, and that it could not have been a contributing cause of collision. Pp. 607-608. As to the time when departure from the rule by the navigator of the starboard hand vessel is justifiable, it was said "it ought not to be made a complaint "against him that he waited too long or acted too "soon," when he uses his best judgment. Here, however, the *Pomaron's* officer knew and admitted that the time had not arrived for him to take action.

In *The Tempus,* XII Asp. M. C., N. S. 396, the starboard hand vessel, *Tempus,* did hold her

course and speed right up to the very jaws of collision. She then ported and hard-aported, but did not blow a signal.

The only question of fault against her was her failure at the last moment to sound her signal indicating that she was changing her course to starboard. As to this, Sir Samuel Evans said, at p. 399:

"I think that, even if the signal had been given by the *Tempus* when she ported and hard-aported, *it would not have had any effect upon the collision—that the want of that signal did not cause the collision nor contribute to the casualty.*"

In *The Franconia,* 2 P. D. 8, the situation was under the overtaking rule, involving very different circumstances to those that pertained here. The action of the leading vessel, the *Strathclyde,* in that case, cannot be likened to the *Pomaron's* movements, therefore.

The Court of Appeal, in reviewing the case of *The Corinthian* [1909], P. 260, distinguished and explained the decision in *The Bellanoch* [1907], A. C. 269. It was said, at page 277 in the report of the former case: "the *Bellanoch* was not making really a sea manœuvre at all, but, being imbedded more or less in the mud, was merely putting her engines astern for the purpose of freeing herself, *and not for the purpose of any manœuvre in relation to the other vessel.*" The case was not regarded as modifying or relaxing the general rule of proof.

In a later case, *The Ancona* [1915], p. 200, opinion by Bargrave Deane, *J.,* the same fault was considered as that charged against the *Bellanoch, viz.,* failure to sound a three-blast signal on putting the engines astern. The colliding vessel, the

Monica, was bound under the rules to keep clear, as the overtaking vessel. Although she had notice that the *Ancona* was turning, presumably to anchor, by reason of a special signal required by the harbor rules, the *Monica* attempted to pass too close to the *Ancona.* The latter was reversing her engine, but did not sound a three-blast signal. Both vessels were held at fault.

It is to be noted that the decision in *The Ancona* did not fall within the statutory rule of evidence repealed by Section 4 of The Maritime Conventions Act, 1911, on which stress is laid in the petitioner's brief, the cause of action having arisen after the repeal. Nevertheless, the Court apparently resolved all doubts against the *Ancona* because of infraction of the rule.

The dictum of Mr. Justice Brown in *The Umbria,* 166 U. S. 404, 420-421, is quoted by the petitioner, in support of the contention that the lower Courts here applied an erroneous test to the propriety of the *Pomaron's* porting, and that they considered only whether or not the collision would have occurred if the *Pomaron* had not ported. It was said in the *Umbria:*

"The propriety of certain manœuvres cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speeds can be stopped before their arrival at the point where their courses intersect."

This statement must be considered in relation to the inquiry to which it was directed, viz., regulation of speed in a fog. The test of moderate speed as laid down in that case, with respect to former article 18, may be said to fix the intersection of the courses as the point within which each vessel is bound to stop, since they must

maintain only such speeds as will render it possible to be stopped before arrival at that point, after they come in sight of each other. It cannot be understood, however, that the "certain manœuvres" referred to in the quoted extract were meant to embrace the movements of two vessels on crossing courses which are in plain sight of each other, and the navigators of which must necessarily consider "the chance that the two vessels may or may not reach the point of intersection at the same time." Otherwise, there would not be any meaning to the preliminary article of the rules, previously quoted, in which navigators are warned that a constant bearing presages danger of collision; that is, if the bearing of the crossing vessel does not change, it is known that the two will inevitably reach the point of intersection at the same time.

It must be concluded that the propriety of a manœuvre as between crossing vessels in sight of each other is very largely dependent on whether they would or would not reach the danger point simultaneously. In the present instance, the officer of the *Pomaron* could have ascertained with certainty, by taking occasional and reliable compass bearings, whether or not that situation did or did not exist; and, if the petitioner could have established that the situation existed in fact; that is to say, that the two vessels would have collided despite the *Pomaron's* change of course, this would have been persuasive evidence at least that the change of course "did not" contribute to the collision and the resulting damage to the respondents, although not that it "could not possibly" have caused or contributed thereto, perhaps. Indeed, that the Courts sought to ascertain this fact indicates that the "did not" rule was the test actually applied.

These decisions of the Second Circuit do not indicate that the Court in the present case has departed from the rule as originally laid down, or that the rule has been more harshly applied in this instance. On the contrary, the Court has shown now, as formerly, that proofs of freedom from fault must be *certain,* not merely *problematical,* where the infraction of a navigational rule is established; and that the burden of the proof is on the vessel violating the rule.

The petitioner also argues that the "did not" rule was applied in the *Agra,* L. R. 1 P. C. 501. It may be remarked that the Court in that case laid down the rule apparently quite apart from a statutory rule of evidence that a vessel which departs from the rules of navigation "takes upon herself the obligation of showing both that her departure was at the time it took place necessary, in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger." Pp. 504-505. The action of the *Pomaron* has not been shown to have been justifiable under either of these tests.

Whatever may be the distinction that was intended to be drawn by the Courts, if any, in the so-called "could not" and "did not" rules it cannot be doubted that all agree in effect that the proofs must be certain to relieve a colliding vessel of liability for violating a statutory rule of navigation, and the onus is placed on the vessel departing from the rules.

It may be conceded that uncertainty as to whether collision would or would not have occurred had neither vessel made any change does not invariably establish that a manœuvre adopted by one vessel, even though in violation of a rule of

navigation, necessarily contributed to the collision.

For example, if the *Pomaron* had starboarded in the present case when she ported, it would have been a violation of the rule as much as her porting was; nevertheless, we know now that such starboarding would not have contributed to collision, but would, in fact, have avoided it.

The petitioner's difficulty, however, arises from the fact that, owing to the contradictions in the testimony of the navigating officer of the vessel, including his contradiction of the entries made in his log of the bearing of the *Alleghany,* together with his failure to carefully watch the latter's compass bearing as she approached, it is rendered impossible to determine that the *Alleghany* would not have crossed the bow of the *Pomaron* had neither vessel made any change. If such were the case, *and if the entry in the Pomaron's* log of the hearing be accepted as correct *such must have been the case,* then the initial porting by the *Pomaron* not only may have but actually did contribute to the collision. *Ante,* p. 31.

It is submitted that the proofs have affirmatively established contributory negligence on the part of the *Pomaron;* but, if our contention in that respect is not sustained, the evidence is clearly insufficient to support a finding that the *Pomaron's* departure from the rules did not contribute to the collision and the conclusions of both lower courts were therefore proper.

FOURTH POINT.

THE ISSUES RAISED IN THIS PROCEEDING HAVE BEEN EXTINGUISHED BY REASON OF A COMPROMISE AND SETTLEMENT, WHICH OPERATES AS A BAR TO THIS PETITIONER.

After judgment had been entered on the mandate of the Circuit Court of Appeals, the petitioner filed a petition for limitation of its liability as owner of the *Pomaron*. Subsequently, claims were filed in due form, including those of the respondents herein, and an agreement of settlement and compromise among the parties concerned was later entered in the limitation proceedings. The issues in the latter were the same as those in the suits here, and all of the parties in the present suits were also parties to the limitation proceedings. Under these circumstances, the questions now raised are moot questions.

A motion is entered to dismiss the writ of *certiorari* on these facts, and a separate brief in support of the motion has been presented, which is respectfully submitted for the Court's consideration on this point.

LAST POINT.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED, OR THE DECREES OF THE DISTRICT COURT AND OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

December, 1916.

Respectfully submitted,

J. Parker Kirlin,
Lawrence Kneeland,
D. Roger Englar,
William H. McGrann,
Of Counsel for Respondents.

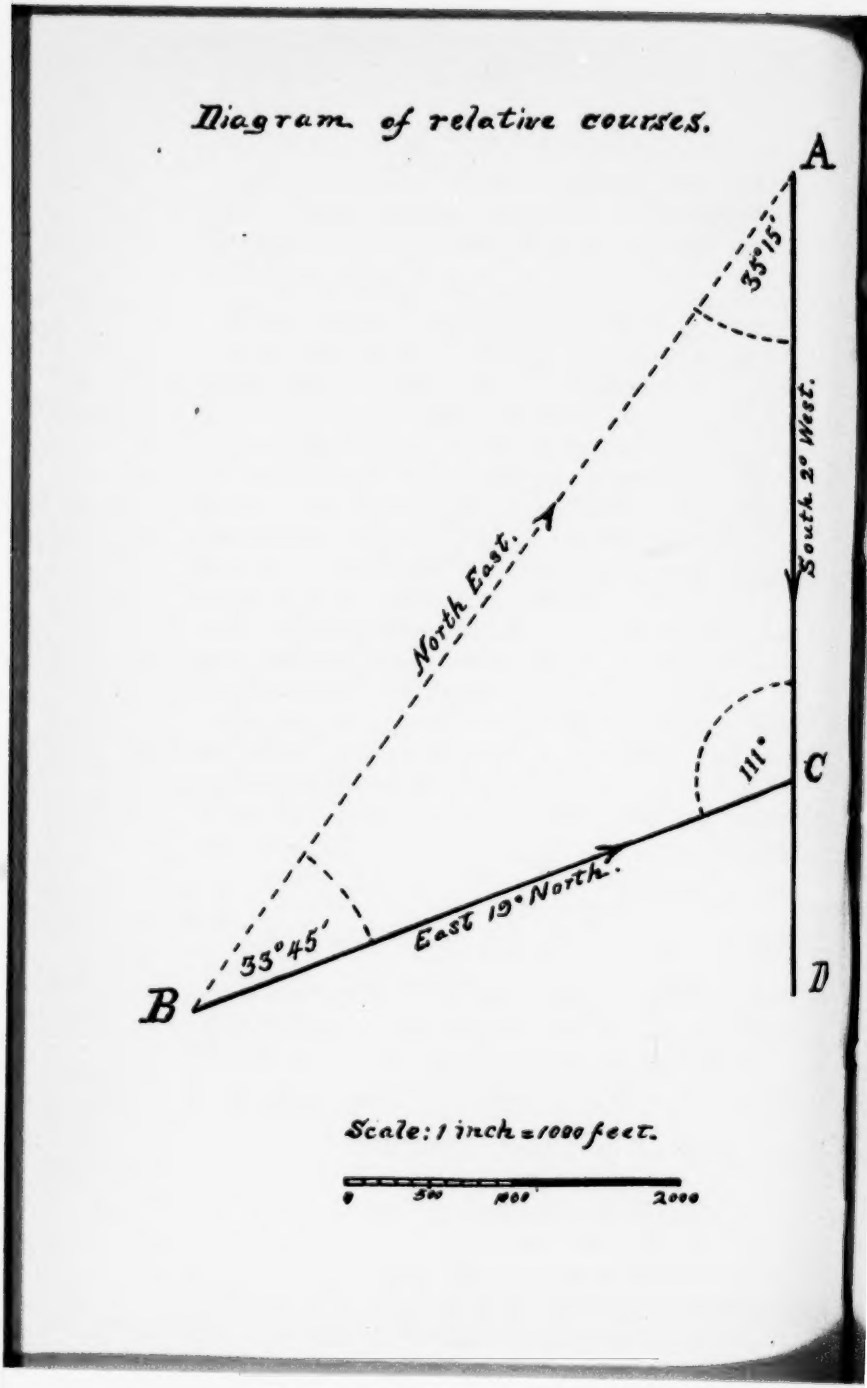
Diagram of relative courses.
A
35°15'
South 2° West.
North East.
111°
C
East 19° North.
33°45'
B
D
Scale: 1 inch = 1000 feet.
0
500
1000
2000

KEY TO DIAGRAM.

A=Position of *Alleghany,* bearing North East from the *Pomaron,* when the latter altered course.

B=Position of *Pomaron* when her one-blast whistle was sounded and helm ported.

C=Intersection of original courses protracted.

ACD=*Alleghany's* course, South 2° West.

BC=*Pomaron's* original course, North 19° East.

Angle at C=111°, intersection of courses AC and BC.

Angle at A=35° 15′, bearing of *Pomaron* from *Alleghany.*

Angle at B=33° 45′, or three points, bearing of *Alleghany* from *Pomaron.*

BA=*Alleghany's* bearing from *Pomaron,* North East, the distance B to A being one nautical mile, viz.: 6080, when *Pomaron* changed course.

BC=Distance of *Pomaron* from intersection of courses, 3760 feet, when *Pomaron* changed course.

AC=Distance of *Alleghany* from intersection of courses, 3618 feet, when *Pomaron* changed course.

AD=Distance *Alleghany* would have travelled, viz.: 4804 feet, while *Pomaron* travelled distance BC.

CD=Distance *Alleghany* would have passed intersection of courses, 1186 feet, when *Pomaron* reached C.

[NOTE: Refer to pages 34-37 and 41-42.]